Supreme Court, U.S.
FILED
JUL 2 1991
OFFICE OF THE CLERK

No. 90-1757

IN THE

Supreme Court of the United States

October Term 1990

ALBERT RUSSO and ANNE RUSSO,
Petitioners,

v.

MASON-McDUFFIE INVESTMENT CO., INC.,
a dissolved California corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Albert Russo and Anne Russo submit this brief in reply to Respondent's ("Mason-McDuffie") Opposition to the Petition for Certiorari May 15, 1991, by Albert and Anne Russo, Petitioners, in the United States Supreme Court.

1. MASON-McDUFFIE CONCEDES THAT

PETITIONERS RUSSO WIN IF THIS COURT ADOPTS THE KEYSTONE RULE.

Nowhere in the opposing memorandum do Respondents refute the fact that if this Court adopts Keystone, Petitioners Russo will win. Instead of directly meeting the issue, Mason-McDuffie buries a discussion of Keystone in footnote 10 (page 9) of their opposing brief without ever mentioning whether the period of limitation should commence only upon the end of the unlawful conduct of the perpetrator. Mason-McDuffie thus concedes that its continuing unlawful conduct in the same pattern of racketeering activity, as alleged in the Complaint in the Court below, will permit the Russos to try their case against Mason-McDuffie.

Mason-McDuffie attempts to deflect the Court's attention by claiming to be a

person not subject to suit because it only participated in the pattern of racketeering activity that hurt the Russos instead of being the person that directly hurt the Russos (Respondent's Brief in Opposition "RB":3). However, the RICO statute is express that racketeering activity is actionable if it "indirectly" injures a plaintiff and such conduct is within Congress' expansive intent in the RICO statute (18 U.S.C. Section 1962 (a-d)). Mason-McDuffie's claim that the participation was "in other unrelated transactions" (RB:3) is contradicted by the Complaint which is not permitted on a Motion to Dismiss.

2. MASON-McDUFFIE CONCEDES THAT THERE IS A SPLIT AMONG THE CIRCUITS.

Despite the fact that this Court routinely and obviously should grant certiorari to resolve a division among the Circuits (RB:7, n. 6), Mason-McDuffie

stubbornly argues that the instant case is not "certiorari worthy" because the Keystone rule is not "plausible" or "viable" (RB:6). Mason-McDuffie's argument begs the question that this Court is called upon to decide in the instant case, which is whether the Keystone rule should be followed or the erroneous numerical majority against Keystone.

Mason-McDuffie's question begging argument is manifest when it leaps from its mischaracterization in topic 3A (RB:6) that Keystone is not "plausible" or "viable" to its unqualified assertion that Russo's claims "are untimely under any rule of accrual" (RB:10). Epithetical jurisprudence, putting modifiers on legal terms to support a fallacious conclusion, is not a substitute for reasoned argument before this Court. Under Keystone, plaintiffs win, and this Court should

avail itself of this opportunity to declare such the uniform nationwide rule.

3. THE RUSSO CASE IS AN APPROPRIATE VEHICLE TO ANNOUNCE A DECISION ON THE ACCRUAL ON THE STATUTE OF LIMITATIONS UNDER RICO.

Mason-McDuffie argues "equitable concerns" weigh against this Court's grant of certiorari based on assertions of fact that are not true.

First, Mason-McDuffie argues that lost profits are not "real" injury (RB:11). The lost profits in this case amount to $555,000.00. The damages are both real and substantial.

Second, Mason-McDuffie asserts that it had "no role" in soliciting Russo's investment in the bust-out scheme while ignoring the allegations of the Complaint that Mason-McDuffie had a central role in operating the bust-out scheme (i.e. participating in a pattern of racketeering

activity). The Complaint also alleges that Mason-McDuffie's relationship to various enterprises violated all four subdivisions of RICO. Accordingly, it is simply not true that Mason-McDuffie had "no role" in illegal activity despite the fact that other persons in the unlawful scheme in the same pattern of racketeering activity dealt with petitioners Russo. Mason-McDuffie is, in effect, ignoring two centuries of jurisprudence that holds people who participate in an illegal scheme with knowledge of their wrong-doing are liable for all consequences of their acts, whether the particular conduct involved in a particular plaintiff was theirs or not. RICO reaches "peripheral" defendants (RB:11) as much as central players in the pattern because the statute says "directly or indirectly".

Mason-McDuffie goes outside the

record in claiming that Mason-McDuffie was incapable of committing any further predicate acts because it dissolved (RB:11). However, the amoeba-like structure of the typical racketeering organization is exemplified by Mason-McDuffie's concession that, before its dissolution, it was owned by another organization, Mason-McDuffie Co., a partnership. Pointedly, Mason-McDuffie does not, and cannot, on this record claim that it did not commit further predicate acts because a successor entity carried on the business, or because the Complaint states that Mason-McDuffie was continually engaging in offenses long after its dissolution. Because this case comes to this Court on a Motion to Dismiss, such factual arguments cannot be raised by the Respondent.

Third, Russo has not had his "day in court" (RB:12). The settlement of Russo

II in the Ninth Circuit Court of Appeals was parsimonious. Russo has not had his day in court against Mason-McDuffie because other defendants chose to make a settlement.

Finally, the failures of the process server in Russo I and Russo II does not imply that the litigant has consistently demonstrated a lack of diligence (RB:12). On the contrary, the procedural problems in the earlier cases enhance the certiorari worthiness of this case. This case has no collateral or other issues that might cloud the presentation of the issue of whether the RICO statute of limitations will be allowed to accrue while the respondent is still engaging in the same pattern of racketeering activity as has injured petitioner. This case cleanly presents the sole issue to be resolved, whether this Court is going to

resolve the conflict between the Circuits by following the Third Circuit in Keystone or the other the Circuits.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: June 28, 1991